

SOUTH AFRICA / JUDGMENT

L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another (J1990/2014) [2014] ZALCJHB 365; 2015 (6) SA 256 (LC); (2015) 36 ILJ 2617 (LC) (25 September 2014) [2014] ZALCJHB 365

COURT

Labour Court Johannesburg

BEFORE

Snyman

CASE / FILE NUMBER

J1990/2014

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1990 / 2014

In the matter between:

L'OREAL SOUTH AFRICA (PTY) LTD

Applicant

and

SHAUN DAVID KILPATRICK

First Respondent

HENKEL SOUTH AFRICA (PTY) LTD

Second Respondent

Heard: 23 September 2014

Delivered: 25 September 2014

Summary: Restraint of trade – restraint enforced – leave to appeal application filed – effect thereof

High Court Rules – provisions of Rule 49(11) – operation of interdict suspended by leave to appeal unless Court directs otherwise – applicable in Labour Court – principles considered and applied

Superior Courts Act, 2013 – Section 18 – applicability to Labour Court – principles considered – Section 18(4) considered and found to be not applicable to Labour Court

Leave to appeal – suspension of original order – circumstances considered – application of Rule 49(11) and Section 18(1) and

(3) – interdict remains enforceable pending appeal – original order not suspended

SNYMAN, AJ

Introduction

[1] This matter originally came before me as an application by the applicant to enforce a restraint of trade covenant against the first and second respondents. In a judgment handed down on 16 September 2014, I granted an order in terms of which, in salient

terms, the restraint of trade was enforced against the first respondent by way of interdict, and thus, consequently, the first

respondent was interdicted and restrained from being employed by and with the second respondent. I however also granted an order enforcing the payment provisions of the restraint agreement which operate in favour of the first respondent, as against the applicant.

[2] On 17 September 2014 the first respondent filed an application for leave to appeal to the Labour Appeal Court. The second

respondent, of its part, has specifically stated that pending this application for leave to appeal and/or any consequent appeal being determined, the second respondent could not comply with the order referred to above. In simple terms, and pending this appeal process, the first respondent remains employed with the second respondent as if the restraint was not enforced. The obvious effect of this is that the enforcement of the restraint of trade has no consequence, and the first respondent remains employed by the second respondent under exactly the same prevailing conditions giving rise to the urgent application in the first place.

[3] On 19 September 2013, the applicant then brought an urgent application in terms of which the applicant has sought, in terms of Rule 49(11) of the High Court Rules, that the order remains executable and its operation not be suspended, as a result of the

pending leave to appeal application by the first respondent. This application is opposed by the first respondent, who filed an answering affidavit. I accept that the application is indeed urgent, and as urgency was in any event not placed in issue in argument before me, I will now proceed to determine this application as one of urgency.

Relevant

facts

- [4] The applicant has stated that it has made out a case to enforce its restraint against the first respondent and is immediately entitled to the benefits thereof. Instead, and in the contention of the applicant, its prejudice not only remains but is compounded every day the first respondent remains employed at the second respondent. The applicant has further stated that the restraint of trade has a limited term (period), and with any appeal simply proceeding in the normal course, and by way of the application of the normal Rules of Court and the Practice Manual, the relief obtained by the applicant would be rendered ultimately useless. The applicant would derive no benefit of any kind from its successful litigation.
- [5] The applicant has set out the applicable time limits relating to the prosecution of the appeal, and has specifically said that in the ordinary course of such an appeal, the biggest part of restraint period would probably have expired by the time the appeal is heard, rendering it valueless. The first respondent, other than stating that this Court should find a balance between his rights and applicant's interests, has not taken issue with this contention, which is clearly, as a matter of practice, the simple reality.
- [6] The first respondent has also not sought to apply for leave to appeal as a matter of urgency, meaning that the application for leave to appeal contains no request nor is it prayed that it be dealt with on an urgent or expedited basis. The first respondent has also provided no indication in its answering affidavit that it has approached the Registrar and asked the Registrar to make any such arrangements. In fact, it is clear that the first respondent propagates an appeal in the normal course, and in my view, deliberately so. I will address this hereunder.
- [7] The applicant has continued to tender compliance with the payment provisions of the order I granted, even in the interim, and pending any appeal. The applicant has not taken issue with the enforcement of the payment provisions in the restraint agreement and has not sought any leave to appeal in this regard.
- [8] The first respondent has indicated that whilst employed at the second respondent, he would receive a net salary of R35 655.00, whilst his wife earns a net salary of some R13 000.00. The respondent has stated that the net of the 66% salary payment he would receive in terms of the restraint agreement from the applicant, only amounts to R22 000.00. The first respondent has stated that this is insufficient for him to make ends meet, considering his monthly expenses of R49 000.00 he has set out in the answering affidavit. It has to be accepted that the effect of the order against him will cause him, at least currently, financial

hardship. But the question remains whether this is irreparable harm.

- [9] The first respondent has also said that if the applicant's application is granted, he would lose his current employment at the second respondent and this will prejudice his career advancement. Now, and for the first time, the first respondent also says that he only has experience in the professional hair care market and he is unable to find employment in any other field. The first respondent however still did not discover his CV and has not explained why he said nothing like this in the original answering affidavit in the restraint application.
- [10] A final consideration is a contention by the applicant that considering the fact that it would continue to pay the first respondent 66% of his salary, and then considering that the first respondent can find any other employment whilst still being so paid to supplement this income, the first respondent would probably lose nothing at all.
- [11] All the above must also be considered in conjunction with the fact that the issue at stake is a restraint of trade application, and therefore the circumstances giving rise to that original application remains relevant in considering this application.

The application of the Superior Courts Act

- [13] The simple fact is that the SC Act does not directly apply to the Labour Court and Labour Appeal Court. The Labour Court is not established in terms of the SC Act, but in terms of the LRA[2]. In terms of section 151(1) of the LRA: 'The Labour Court is hereby established as a court of law and equity.' And further, in terms of section 151(2): 'The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction'. As to the relevant powers of the Labour Court, section 158(1), provides that: 'The Labour Court may- (a) make any appropriate order, including- (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order'. Finally, and generally, the Labour Court has the power to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law.[3] This makes the Labour Court certainly comparable if not identical to any High Court when exercising duties and functions under its jurisdiction, but this must also mean that the Labour Court is governed by the provisions of its own statute (the LRA) and not the SC Act.
- [14] When it comes to the issue of appeals, section 167(1) of the LRA establishes the Labour Appeal Court as a court of law and equity. In terms of section 167(2), the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court. Also, section 167(3) provides that 'The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.' The appeal process is determined by section 166 of the LRA, and requires an application to be made to the Labour Court for leave to appeal to the Labour Appeal Court,

against any final judgment or final order of the Labour Court. The LRA does not prescribe how this application must be determined, save for the general power in section 166(3) where it is provided that ‘Leave

to appeal may be granted subject to any conditions that the Court concerned may determine.’ Once again, and although this makes the Labour Appeal Court virtually identical to the Supreme Court of Appeal, the Labour Appeal Court is also governed by the provisions of its own statute (the LRA) and not the SC Act.

- [15] What is also clear is that the LRA has no provisions comparable to section 18 of the SC Act. But does this mean that these provisions must now find application in the Labour Court, as is, especially considering, as I have said above, that the Labour Court and Labour Appeal Court is not governed by the SC Act?
- [16] In deciding this issue, I point out that some of the provisions of the predecessor of the SC Act, being the Supreme Court Act[4], has found fertile soil in the Labour Court and Labour Appeal Court. A pertinent example is Section 21A of the Supreme Court Act, dealing with issues on appeal having become moot. In *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others*[5] the Court said: ‘I am mindful of the fact that the Labour Relations Act (LRA) does not have a provision similar to s 21A(1) but that, in my view, is no impediment to the application of the principle by this court or the Labour Court. Section 167(1) of the LRA provides that this court is a court of law and equity. This renders the court competent to import any rule or principle of general application such as the one at issue presently into its own processes’. The exact same approach was followed in *Ball v Bambalela Bolts (Pty) Ltd and Another*[6] and *Johannesburg City Parks v SA Municipal Workers Union and Others*[7]. But the crux of this approach is not a finding that the Supreme Court Act actually applies, but an importation by the Labour Appeal Court and Labour Court of only those provisions of any rule or principle of general application found in that statute, so as to fill a lacuna with regard to a general principle or rule not specifically provided for in the LRA. Simply put, the Labour Appeal Court and Labour Court in effect develop such Courts’ own principles and rules of general application by adopting from pre-existing provisions found in other jurisdictions. To use colloquial terminology – why re-invent the wheel if you can buy it off the shelf?
- [17] Another example would be the application of section 19 of the Supreme Court Act concerning declaratory orders, by the Labour Court, in instances where the Labour Court exercises its powers in terms of Section 158(1)(a)(iv) of the LRA. This was done in *National Employers' Association of SA and Others v Minister of Labour and Others*[8] and in *Salvation Army (South African Territory) v Minister of Labour*[9]. Again, the Labour Court imported provisions in seeking to develop its own and already pre-existing power under the LRA. Two final examples of this approach of importing selected provisions of the Supreme Court Act, is the application of section 31(1) of the Supreme Court Act relating to the refusal by a person to take an oath which was dealt with in *Morningside Farm v Van Staden NO and Another*[10], and section 22(a) regarding the admission of further evidence on appeal dealt

with in Acting Provincial Commissioner, Correctional Services and Others v Matheyse (1) [11]. I may also mention that the LRA itself, by way of section 184, specifically imports the provisions of sections 5, 18, 25, 30, 31, 39, 40 and 42 of the Supreme Court Act by making it applicable to the Labour Court, or the Labour Appeal Court, with these being provisions relating to execution of process, admissibility of records, process being issued against a Judge, the securing of attendance of witnesses and how witnesses must be dealt with, and provisions relating to execution.

[18] The distinction between the Labour Court importing selected provisions from another existing statute to develop its own general

principles and rules, and the Labour Court actually being bound by such other statute, is critical. The distinction lies in the ability to be selective. If the Labour Court is bound by the statute and such statute specifically regulates the Court's

affairs, such as the LRA, then the Labour Court must apply all the provisions of such statute and cannot decide which to apply and which not. But if the Labour Court imports to develop its own rules and principles of general application, then certainly it can be selective. The power of the Labour Court to develop its own rules and principles of general application is found in section 158(1)(iii) and (iv), as well as section 158(1)(j) (which I have referred to above), together with Rules 11(3) and (4), which Rules read:

'(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any

procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

[19] In crisp terms, where the Labour Court seeks to import or adopt to develop its own principles and rules of general application, it can be choosy. The Labour Court need not take on all the provisions of a particular statute, such as the SC Act, or even all the provisions of a particular section in that statute. The Labour Court must consider what is best suited to its own primary objectives in terms of the LRA and its own particular structure and process as designed by the LRA and provided for in its own Rules. To import from the SC Act does not make the entire Act per se applicable to the Labour Court. I am aware that the definition of 'Superior Court' in section 1 of the SC Act refers to the Constitutional Court, the Supreme Court of Appeal, High Court or any other Court of similar status to the High Court, and the latter provision would include the Labour Court and Labour Appeal Court. But more important to the current issue under consideration is section 2(3) of the SC Act which reads:

‘The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such courts, but in the event of a conflict between this act and such legislation, such legislation must prevail.’ (emphasis added)

[20] An illustration, in my view, that the provisions of the SC Act do not per se regulate and apply to the Labour Court and Labour Appeal Court, can be found in the recent judgment of the Labour Appeal Court in *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) and Others*[12] and particularly in the following dictum from such judgment:

‘The powers of the SCA to make orders on the hearing of appeals to it derives from the Constitution, but also, in particular before

the Superior Courts Act of 2013, from the provisions of s 21 and s 22 of the Supreme Court Act.

The power of this court to make orders in respect of appeals before it ultimately derives from the Constitution, but more immediately,

particularly, from s 174 of the Act’ (referring to the LRA)

[21] It is accordingly my conclusion that the SC Act does not apply to the Labour Court or Labour Appeal Court. However, selected provisions from such Act may from time to time be imported or adopted by the Labour Court where the same is complementary to the Labour Court’s own rules, provisions and processes. This the Labour Court does by virtue of its own powers in terms of Section 158(1) of the LRA referred to above, and Rules 11(3) and (4) of its own Rules. The Labour Court therefore imports what it wants, and needs, from the SC Act, only where it is in the interest of proper administration and process in the Labour Court.

[22] Therefore, and in my view, section 18 of the SC Act does not per se find application in the Labour Court. The question however remains is that in exercising the powers the Labour Court has in terms of section 158(1) of the LRA and Rules 11(3) and (4) of the Labour Court Rules, should I nonetheless import the provisions of section 18 of the SC Act into the conduct of process in, and regulation of, the Labour Court, especially considering, as I will address hereunder, that Rule 49(11) of the High Court Rules have been imported into the Labour Court process.

Rule 49(11) of the High Court Rules

[23] From the outset, I must state that the High Court Rules[13] do not apply to or regulate proceedings in the Labour Court. The Labour Court has its own Rules. But, from time to time, it has been found that there is a lacuna in the Labour Court Rules relating to certain proceedings. What the Labour Court has equally done in such cases is use its powers in terms of Rule 11(3) of its own Rules and import or adopt specific High Court Rules into its own proceedings. There are a number of such instances of the Labour Court having so used Rule 11(3), being:

23.1 Ganga v St John's Parish[14]: The Court held that since the Labour Court Rules do not provide for security for costs, it was appropriate to adopt the procedure in Rule 47 of the High Court Rules.

23.2 Fakude and Others v Kwikot (Pty) Ltd[15]: The Court applied Rule 33 of the High Court Rules pertaining to a stated case.

23.3 National Union of Metalworkers of SA on behalf of Members and Others v Bell Equipment Co SA (Pty) Ltd[16]: The Court adopted the exception process found in Rule 23(1) of the High Court Rules.

23.4 Sheriff for the High Court, Stellenbosch v High Rustenburg Hydro and Others[17]: The Court said that the appropriate procedure to be adopted in interpleader proceedings in the Labour Court is that provided for in Rule 58 of the High Court Rules.

23.5 Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Express Payroll CC[18]: The Court adopted the procedure in rule 7(1) of the High Court Rules pertaining to proof of an applicant's and its attorneys' authority to act on behalf of all the applicants. The Court in fact specifically said:[19] 'To cure such a 'lacuna' in the Labour Court Rules nothing precludes the adoption of the Rules of the High Court'.

23.6 Sibisi v Ganpath[20]: Because there was no tariff promulgated for taxation in the Labour Court, Rule 48 of the High Court Rules which provides for taxation was applied.

23.7 Randfontein Estates Ltd v Tembe and Others[21]: Rule 30 of the High Court Rules relating to irregular proceedings was applied because the Labour Court Rules contained no analogous provision.

[24] This brings me neatly to the High Court Rule at stake in casu, which prior to the advent of the SC Act constituted the only provision relating to the suspension of orders pending appeals in the High Court. This is Rule 49(11). This Rule provides:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[25] Again by utilising the provisions of Rule 11(3) of the Labour Court Rules, the Labour Court has adopted the above provisions of Rule 49(11). In Christo Bothma Finansiële Dienste v Havenga and Another[22] the Court said:

‘The rules of this court are silent about whether an application for leave to appeal stays proceedings. This court does not have a similar provision to rule 49(11) of the High Court Rules. However rule 11 (3) of the rules of this court states that if a situation for which the rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances. I am of the view that rule 49(11) of the High Court Rules should also be adopted by this court.’

[26] As Rule 49(11) is clearly applicable in the Labour Court, by virtue of having been imported in terms of rule 11(3), this means that the first respondent’s application for leave to appeal filed on 17 September 2014 suspends the order as contained in my judgment of 16 September 2014. This being the case, the applicant has now applied, as contemplated by Rule 49(11), for this Court to now ‘direct otherwise’. In considering Rule 49(11), Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[23] said:

‘... it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the

judgment was given must make special application. The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (Reid’s case, supra at p 513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; *Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another* supra at p 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf *Fisner v Thornton* 1929 AD 17 at p 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and

- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

The above ratio has been consistently been applied by the Courts in deciding whether or not to 'direct otherwise' as contemplated by Rule 49(11).

[27] In *National Entitled Workers Union and Others v Director, Commission for Conciliation, Mediation and Arbitration and Others*[24] the Labour Appeal Court dealt with the question whether the Labour Court could adopt a procedure which it considers appropriate in the case of an appeal lodged against a failed

appeal of a deregistration decision relating to a trade union. The Court said the following:[25]

'Viewed accordingly, a suspension of a deregistration decision, pending an appeal, should be dealt with by way of a careful consideration of the relevant factors, which would allow for a just and equitable determination, including the potential for irreparable harm or prejudice to either of the affected parties and the public interest By engaging in this enquiry a court would be able to determine whether an application for leave to appeal should suspend the decision. It will be able to arrive at a conclusion, after a careful consideration of the competing interests, including any prejudice which may be caused to the union as a result of its suspension by the registrar. Further, the court could take account of the prospects of success on appeal and determine whether the appeal which had been lodged is frivolous or vexatious; that is whether the appeal has been prosecuted with the bona fide intention of reversing the judgment or for an ulterior purpose, such as to continue the exploitation of vulnerable workers.

In my view, the adoption of a test to determine whether the deregistration decision is suspended pending an appeal, falls manifestly within the clear purpose of s 106. It follows, therefore, that rule 11(3) and (4) of the Labour Court Rules and similar provisions in the Labour Appeal Court Rules empower the Labour Court or this court to adopt the necessary procedure to achieve the purpose of the section.'

[28] In *N and Others v Government of Republic of South Africa and Others (No 2)*[26] the Court said the following as to the approach to be followed in considering applications in terms of Rule 49(11):

'In considering an application under Rule 49(11), Erasmus in *Superior Court Practice* at B1-370A, referring to decided cases, says the following:

'The Court to which application for leave to appeal is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. In the exercise of its discretion the court should determine what is just and equitable in all the circumstances, and in doing so, should have regard, inter alia, to the following factors.'

To paraphrase the factors referred to by Erasmus in the context of the citation of the parties in this case, these will be: (a) the potential of irreparable harm being sustained by the respondents if leave to execute were to be granted and to the applicants if leave were to be refused; (b) the prospects of success on appeal; and (c) where there is potential of irreparable harm or prejudice to both applicants and respondents, the balance of hardship or inconvenience, as the case may be.’

[29] Further to the above, and currently in casu, the application for leave to appeal by the first respondent has not yet been determined and is still in the process of being prosecuted

by the first respondent in terms of Rule 30 of the Labour Court Rules and the Labour Court Practice Manual. In such circumstances, it is certainly desirable that the Judge who granted the original order also deals with this application, as it that Judge who would also be in the best position to consider whether the application for leave to appeal has any prospects of success or is bona fide. In *Ncube v Department of Home Affairs and Others*[27], the Court, in specifically dealing with this, said:

‘... Because the application for leave to appeal has not yet been dealt with by Pakade J it appeared to me that I was in somewhat of an

invidious position. Whether I am of the view that respondents have no prospects of success on appeal, or vice versa, Pakade J may well be of a different view. This seems to me to illustrate the desirability of the judge who granted the order, dealing also with any rule 49(11) application. This is all the more so when the application for leave to appeal has not yet been heard.’

[30] The above principles have recently been applied by Steenkamp J in the Labour Court in the judgment of *Solidarity v Department of Correctional Services and Others: In re Solidarity and Others v Department of Correctional Services and Others; Solidarity and Others v Department of Correctional Services and Others*[28]. Steenkamp J, in ultimately deciding in favour of the interim enforcement of a judgment pending an appeal, applied Rule 49(11), and referred with approval[29] to the dictum from the judgment in *South Cape Corporation (Pty) Ltd* I have specifically referred to above. Steenkamp J then concluded as follows:[30]

‘As the court pointed out in *South Cape*, I must take into account the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect

purpose, eg to gain time or harass the other party.’

An important consideration in the judgment in *Solidarity*, is that Steenkamp J dealt with the possible prospects of success on appeal as follows:[31]

‘It is apparent that this court need not consider the prospects of success on appeal (or cross-appeal) in any detail, but only whether

it is bona fide. And Rabkin-Naicker J has already ruled that there is a reasonable prospect that another court may come to a different conclusion.

.... the applicant's prospects of success on appeal must be good; the respondents' prospects on cross-appeal maybe less so.'

The learned Judge finally concluded:[32]

'In *Ncube v Department of Home Affairs & others* Pickering J quoted with approval the following dictum of McEwan J in *Sorec Properties Fhillbrow (Pty) Ltd v Van Rooyen*:

'The Court, in proceedings of this nature, is not called upon to enquire into the whole case or to attempt to evaluate the prospects of success on appeal. Only if the Court is satisfied that the appeal has minimal prospects of success or is hopeless, then the Court will take that fact into account and may draw the inference from it that the appeal was noted mala fide, or for the purposes of delay.'

This is not such a case. The balance of convenience, coupled with the prospects of success, favours the granting of the order sought in terms of High Court rule 49(11).'

[31] Accordingly, and in considering the above principles, there exists sufficient precedent not only for the application of Rule 49(11) in the Labour Court, but also as to what approach the Labour Court should follow, and what considerations should be applied, in deciding such application.

Section 18 of the Superior Courts Act

'(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1) —
 - (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[33] It is clear from the above that the substantive considerations that apply to the issue of the suspension of orders pending appeal is dealt with in sections 18(1), (2) and (3). Sections 18(4) and

(5) contain procedural issues relating to this determination.

[34] Sections 18(1) and

(3) was recently deal with by Sutherland J in the High Court in Incubeta Holdings (Pty) Ltd and Another v Ellis and Another[33]. The learned Judge held that despite section 18, the provisions of Rule 49(11) still found application. The learned Judge concluded as follows as to the consequences of the provisions of section 18 now applying:[34]

'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements

are:

- First, whether or not 'exceptional circumstances' exist; and
- Second, proof on a balance of probabilities by the applicant of —

o the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and

o the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

In other words, section 18 appears to now specifically determine the concept of 'irreparable harm' as part of the test already enunciated in South Cape Corporation (Pty) Ltd, and certainly specifically places an onus on the applicant for relief in this regard. And further, it appears that a new requirement of 'exceptional circumstances' has been added.

[35] In considering the requirement of 'exceptional circumstances', Sutherland J in Incubeta Holdings then said:[35]

'The context relevant to s 18 of the SC Act is the set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently — the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending

happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.

Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually the practice as exemplified by the text of rule 49(11), makes the notion of the putting into operation an order in the face of an appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised, therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionally'.

In other words, the learned Judge in Incubeta Holdings accepted that 'exceptional circumstances' is nothing more than a manifestation of the practice that has developed in the application of Rule 49(11). Therefore, the determination of 'exceptional circumstances' remains a factual enquiry in which the considerations in terms of Section 49(11) must still be applied and in terms of which the Judge must exercise an ad hoc discretion as to whether a departure from the default position of an application for leave to appeal suspending the original order is justified. I would agree with such an approach as a basis for deciding 'exceptional circumstances' in terms of section

18. There is no need to reinvent the wheel in this regard. It would seem that section 18 in reality does nothing more than to give written embodiment to what has in practice become the basis upon which the Courts have 'otherwise directed' in terms of Rule 49(11).

[36] Sutherland J in Incubeta Holdings also dealt with the 'irreparable harm' part of section 18 referred to above, and concluded:[36]

'The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'. The discretion is indeed absent, in the sense articulated in South Cape. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision

admitting of some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'.

In simple terms, the duty is now squarely on the applicant for relief to establish irreparable harm to the exclusion of irreparable harm of the other party. It is no longer a balanced weigh off which in simple terms, as the learned Judge described, meant that he who suffers most wins. In short, section 18(3) entails an applicant for relief proving that the applicant will suffer irreparable harm, but the respondent would not. But then, as Sutherland J says, the questions remains – what exactly is ‘irreparable harm’? In answering this question, the Judge must make a factual determination in which, in my view, the nature of the relief and the basis upon which the original order was granted is an important consideration, along with all of the facts of the matter.

- [37] I believe that sections 18(1) and (3) of the SC Act constitutes a development of the jurisprudence relating to Rule 49(11) and the considerations developed in terms of this Rule. The Labour Court cannot ignore these developments, and in my view must remain current with the times. This means that the provisions of this part of section 18 should equally be imported by the Labour Court to be considered with Rule 49(11) in deciding the issue as to whether to order interim enforcement of a court order pending appeal. I therefore conclude that in deciding this application, I will adopt the principles in sections 18(1) and
- (3) of the SC Act together with all the other considerations developed in the application of Rule 49(11) that still remains applicable.
- [38] But where it comes to the provisions of section 18(4) of the SC Act, the situation is entirely different. In terms of section 18(4), where a court has decided in favour of interim enforcement pending appeal, an aggrieved party (the respondent party) has a further and final opportunity to challenge interim enforcement of the order, pending appeal, and retain the default position of suspension of the order. The section contains specific conditions this aggrieved party must adhere to in order to procure this right of challenge.
- [39] Firstly, section 18(4) provides that the aggrieved party has an automatic right of appeal to the next highest court against ‘the order otherwise’. This means that the process in section 18(4) clearly does not apply to the issue of what can be called the merits of the appeal, but only relates to the order for interim enforcement. In other words, the automatic right of appeal is only against the order that the original court order is not suspended pending the appeal. It follows that in order to exercise this right, the aggrieved party must simply note an appeal against the interim enforcement order to the higher court. The requirements applicable to the form of noting of such an appeal would be the same as noting any other appeal where an appellant has accrued a right to appeal. The advantage to the aggrieved party in noting this appeal is that, in terms of section 18(4)(iv) of the SC Act, the interim enforcement and determination not to suspend the original order is in turn automatically suspended. Therefore, the noting of the appeal by the aggrieved party in terms of section 18(4) automatically suspends the interim enforcement order.

- [40] But there is however a specific condition attached to this automatic right of appeal. This condition is found in section 18(4)(iii), being that the appeal in this regard must be dealt with as a matter of 'extreme urgency' by the higher court. Extreme urgency means that the aggrieved party that noted the appeal has the duty to immediately upon the noting of the appeal arrange with the registrar of the appeal court for the hearing of the appeal as a matter of extreme urgency, and the higher court is compelled to consider it on such basis.
- [41] The simple reality is that if I should find that the provisions of section 18(4) are to be imported into or adopted by the Labour Court, I will impose an entirely new obligation on the Labour Appeal Court and impose a new Rule on it that certainly on face value seems to interfere with Labour Appeal Court Rule 5(22). In my view, to do this would entirely inappropriate, for the reasons I will now set out.
- [42] Firstly, the Labour Court and Labour Appeal Court have their own Rules where it comes to appeal processes. In terms of this process, an application for leave to appeal to the Labour Court is required[37], and no automatic right of appeal lies to the Labour Appeal Court. If the Labour Court grants leave to appeal, a right of appeal then lies to the Labour Appeal Court, but if the Labour Court refuses, the Judge President of Labour Appeal Court itself must be petitioned for leave to appeal[38]. The point is simple – there is no provision for an automatic right of appeal that lies to the Labour Appeal Court. The door to the Labour Appeal Court must be properly policed, and to import section 18(4) of the SC Act would undermine this.
- [43] More importantly, however, my view is that in the field of employment law of which the Labour Court and Labour Appeal Court are the custodians in terms of the LRA, the primary function of the Labour Appeal Court is to determine policy and jurisprudence in this field, and focus on the substantive merits of an appeal as the ultimate decision maker. The Labour Appeal Court should not be burdened or tasked with dealing, and may I add on an automatic right of appeal basis, with procedural appeals that have little to do with the merits of a case. In my view, it was never intended by the dispute resolution processes under the LRA that the Labour Appeal Court deal with these kind of matters. I accept that naturally the Labour Appeal Court will have the power to consider any appeal against any order of the Labour Court which would include an order of interim enforcement as contemplated by the matter now before me, but it remains my view that this must be done in the normal course like any other appeal and not be subject to a special dispensation with a permanent open door into the Labour Appeal Court. As the Court said in Powertech Transformers:[39]

'.... it is submitted that this court has to exercise the power, because it has the power. This on its own cannot be a reason why this

court should exercise the power in any particular case. There must be exceptional circumstances present and it must be in the interest of justice for this court to, essentially, perform what is essentially a function of the Labour Court'

I am of the view that section 18(4) is simply not compatible with the dispute resolution functions and process in the Labour Court and Labour Appeal Court and it is simply not in the interest of justice for the Labour Appeal Court to be burdened with such a kind of process.

- [44] Finally in this regard, and in terms of Rule 5(22)[40], the issue of any urgent appeal is the prerogative of the Judge President of the Labour Appeal Court, on the terms and conditions as the Judge President may deem appropriate. I consider it improper to dictate to the Judge President when an appeal may be urgent and how it must be considered, which would be exactly the consequence the adoption of section 18(4) in the Labour Court dispute resolution process would result in.
- [45] I thus conclude that section 18(4) of the SC Act cannot be imported into the Labour Court. I find that the provisions of section 18(4) do not apply to the Labour Court, and cannot be utilised by any respondent party that remains aggrieved by an order of the Labour Court deciding that an order is not suspended pending an appeal. The provisions of this section are simply not compatible with the dispute resolution process in the Labour Court.
- [46] Therefore, and should I find against the first respondent in this matter, the first respondent has no further automatic right of an urgent appeal to the Labour Appeal Court coupled with a further automatic suspension of the interim enforcement order. The only course of action open to the first respondent would be to seek that his application for leave to appeal be urgently dealt with, and should he accrue the right to appeal pursuant thereto, approach the Judge President in terms of Rule 5(22) that his appeal on the merits be urgently dealt with[41] on terms the Judge President directs.

Application of principles to facts

- [47] In casu, the applicant's original application was to enforce a restraint of trade against the first respondent. Fortunately, and where it comes to the considerations in terms of Rule 49(11) and the applicable parts of section 18 of the SC Act, there is considerable overlap between these considerations and the considerations applicable to deciding whether or not to enforce a restraint of trade. In particular, the issues of public interest and the quantitative and qualitative weight of considerations remain relevant in deciding this application as well. I have in detail addressed all the restraint enforcement principles in my original judgment handed down on 16 September 2014, and will not do so again.
- [48] Central to the deciding of this application is the fact that it concerns a restraint of trade. As an inevitable consequence of most of these kind of applications, if successful, an individual respondent would lose his or her employment. It is for this reason that in deciding restraint of trade applications, the enquiry is not just limited to the application of the provisions of a contract strictu sensu, but include the considerations of what is reasonable, the respective interests of the parties and public interest. There is no certainty for an applicant that a restraint would be successfully enforced in Court, and the discretion of a Judge as to what would be 'reasonable' remains central to the determination. In other words, the kind of enquiry that would be made in this application, is to a large extent already contemplated in

deciding whether or not to grant an order in the original restraint application.

[49] In the case of a restraint of trade interdict, it is the immediate protection of the protectable interest of the applicant that is critical to the application even having any purpose. It is all about the elimination of continued risk, which in the case of a protectable interest relating to confidential information can only be achieved by interdicting employment of the individual respondent with the competitor where such respondent is so employed (which is the case in the current matter). If an applicant manages to pass the quite substantial hurdle of convincing a Judge to exercise the Judge's discretion in the applicant's favour, it is in my view untenable that all this effort and the very objective that needs to be achieved is thwarted by the respondent party simply proceeding with an appeal. It is, in my view, the nature of restraint of trade proceedings that in itself must contemplate 'exceptional circumstances'. As the Court said in *Incubeta Holdings*, which I agree with:[42]

'Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'.

[50] Whilst appeal proceedings are continuing, and if the original order is suspended, the individual respondent would remain employed with the competitor. Every day this is allowed to perpetuate would systematically erode the protectable interest of the applicant away to nothing. Therefore, and in its simplest terms, it is the appeal process itself, and not the appeal outcome, that defeats the restraint, even where the Court has found compelling reason to enforce it. Worse still, by the time the matter may end up before an appeal Court, and because of the limited duration (period) of restraints, the restraint period would probably have expired, the appeal would be academic, and the appeal Court would decline to determine it with no detriment to the individual respondent (other than costs of course). [43] Once again, the simple consequence of this would be that the individual respondent would achieve the objective of defeating the restraint without even having to run the risk of successfully prosecuting an appeal, having actually lost in the court a quo. So, no matter what, to the loser in the case of restraints goes all the spoils. In short, the merits of the appeal simply does not matter, but it is the mere noting of the appeal that defeats the restraint and the very objective it is designed to achieve. This simply cannot be permitted and is tantamount, in my view, to an abuse of process. In any event, to allow a restraint to be in essence be defeated on this basis would be entirely inequitable and a failure of justice. It must also be considered that the Labour Court was specifically established as a Court of equity as well, as I have referred to above, and equity must apply to all parties before the Court. In my view, the exact same considerations in the dictum from the judgment in *National Entitled Workers Union*[44] referred to above equally applies.

[51] The judgment in Incubeta Holdings[45] in fact specifically related to the interim enforcement of a restraint of trade, pending appeal. Sutherland J held as follows:[46]

‘The critical component of that approach is a judicial discretion, derived from the inherent jurisdiction of the court, to rule in accordance with the equities present in the given case. An earlier decision, often quoted, is *Leask v French and Others* 1949

(4) SA 887 (C) at 893, where after addressing the dilemma of reconciling contending interests, Searle J concluded with this poignant observation:

‘In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with the preponderance of equities.’

I, with respect, cannot agree more. Surely an entirely inequitable circumstance and result would constitute exceptional circumstances as envisaged by the provisions and considerations referred to above.

[52] It must also be considered that enforcing a restraint of trade is in essence an order ad factum praestandum, meaning there is an inherent component of interim enforcement being required, despite pending further challenge. Sutherland J in *Incubeta Holdings* considered the authorities relating to interim enforcement in the case of such orders, and held as follows:[47]

‘There are several other examples where orders ad factum praestandum have been put into operation pending an appeal. Among them are these:

- *Chaimowitz v Chaimowitz* (1) 1960

(4) SA 818 (C), where an interim custody order in favour of the mother, pending a divorce action, was put into operation, despite an appeal being

noted.

- *Kalahari Salt Works (Pty) Ltd and Others v Bonne Fortune Beleggings Bpk* 1973

(4) SA 471 (NC), where an order was obtained to eject tenants and take possession of certain movables. The tenants noted an appeal. The order of ejectment and for the seizure of movables was put into operation, together with the provision of security by the victor, as contemplated in rule 49(11).’

[53] In also dealing specifically with interim enforcement of a restraint of trade, the Court in *Fox and Carney (Pvt) Ltd v Carthew-Gabriel* (2)[48] held:

‘... The respondent has set out in para. 7 of his affidavit his expenditure for September and the loss he would suffer. I think that there is force in Mr. Grossman's contention that this loss could be substantially mitigated if he were to operate from Mount Hampden or some such other place outside the limits of greater Salisbury. In any event, however, as I have said, it seems to me that the respondent is largely the author of his own misfortune.

The appeal is set down for October 7. Mr. Mercer has argued that, if execution is stayed, the period being only one month, the applicant

will lose only 25 per cent of his protection if the appeal fails. However, I agree with Mr. Grossman's submission that, during the first month, while the respondent's knowledge of the applicant's business and clients is most up to date, the applicant stands to suffer considerable prejudice. There is, in my view, no doubt that the respondent must have a wide knowledge of the applicant's business.

Mr. Mercer argued that the harm to the applicant is potential and unspecified. I am satisfied, however, that in the nature of things it is at this stage impossible for the applicant to particularise his loss, and that the use by the respondent of his knowledge of the applicant's affairs is bound to cause the applicant irreparable harm.

Accordingly, as I have said, am satisfied that the preponderance of equities demands that the application be granted.'

The above ratio, in my view, is apposite in casu, and confirms the very point I have sought to make above. In addition, the first respondent has similarly referred to his loss of income in opposition to this application, and just as considered in the above ratio, I equally believe that this is a case where the first respondent's loss of income can be fully mitigated by the payment order I have given together with any alternative employment he may find to supplement this already guaranteed income

[54] I will now revert back to Incubeta Holdings, which, as I have said, also specifically related to a restraint of trade. In deciding to grant the application for interim

enforcement pending the appeal, Sutherland J considered the following:[49]

'Turning to the circumstances of these litigants, what is relevant, in my view, is the following:

- If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes.
- The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next four and a half months. Unrebutted evidence in the affidavits alleges a breach is taking place at this very time.
- Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available. This places a restraint interdict in a different position to other forms of relief, such as money claims, where the aspect of irreparable harm is a factor extraneous to the substantive relief procured.

- Ellis will, on the probabilities, be without work for four and a half months and without pay. This will be financially detrimental.
- Significantly, no allegation is made that Ellis or his family will endure true hardship during this short period.
- If the appeal is won, Ellis' loss of earnings can be sued for, and the quantum is feasible to compute, including the loss of interest or lost- opportunity cost of being out of funds, and any such interest expended on borrowing for living expenses, if necessary.'

Again, virtually identical considerations apply in casu, with the exception that the first respondent would actually be paid 66% of his remuneration by the applicant for the restraint period and still, in addition to being so paid, find alternative work to further supplement this. I accept that the first respondent will certainly be initially financially burdened and prejudiced as a result of losing his employment with the second respondent. But this is not irreparable prejudice. On the other hand, and whilst the first respondent remains employed with the second respondent, which is clearly the case in casu, the applicant's legitimate protectable interests which it has shown to exist and has no other means to protect, would continue to be eroded and prejudiced.

[55] The Court in Incubeta Holdings concluded:[50]

'The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate which, seems to me, would tend to undermine the role of courts in the ordering of social relations.

Furthermore, it is plain from the summary of circumstances given above that the applicants would indeed suffer irreparable harm if the order is not put into operation. Moreover, it is plain that Ellis will not suffer irreparable harm if the order is put into operation. Although Ellis in his answering affidavit complains that putting the order into operation will render his right of appeal meaningless, this is incorrect for the reasons mentioned above; he cannot be without practical relief. The s 18 test is met on both counts of the second leg.'

Once again, and respectfully, I cannot agree more, and it is my view that the same considerations apply in casu.

[56] The applicant would continue to suffer irreparable harm for as long as the first respondent remains employed at the second respondent, which harm is compounded the longer the first respondent remains so employed. On the other hand, the only harm the first respondent can really suffer is current financial harm, but this harm is simply not irreparable, considering the 66% payment by the applicant and the alternative available to the first respondent of finding any alternative employment to supplement this payment. I add that in *University of the Western Cape Academic Staff Union and Others v University of the Western Cape*[51] Mlambo J (as he then was) said: 'With regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the

inevitable consequence and as such provides no good ground for the granting of urgent interim relief

....', which reasoning can equally apply to the contentions of the first respondent now made in this application. I thus accept that the applicant has indeed show irreparable harm to exist, and I also accept that it has been shown that the current

financial harm to the first respondent, is not irreparable harm.

[57] I will finally touch on the requirement in *South Cape Corporation (Pty) Ltd* of considering the prospects of success on appeal, in particular in considering whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose. In my view, it is clear from the application for leave to appeal and the argument submitted by Mr Kaplan in this application, that the first respondent believed he had a winning argument with the repudiation point raised. As I have fully ventilated in my judgment, as supported by higher Court authority, this argument simply has no merit. Whilst I accept that the actual application for leave to appeal still has to be determined and that I must still have the benefit and consideration of the parties' submission in this regard, my current view, on a prima facie basis, remains, being that I do not believe that there is a reasonable prospect that another Court would otherwise determine.

[58] In my view, and what the first respondent is now doing, is simply to still try and procure the consequences of a favourable outcome of his repudiation point by way of alternative means. I consider that the first respondent has not even sought to have the application for leave to appeal and any further appeal proceedings determined as a matter of urgency. In the first respondent's application for leave to appeal, he has even referred to Rule 9(5) of the Labour Court Rules, which is simply not applicable at all, and relates to appeals to the Labour Court itself against determinations by other functionaries. All this shows, in my view, ulterior purpose. In addition, and considering the general nature of the application for leave to appeal, read with the first respondent's answering affidavit, I am inclined to believe that it is not designed to overturn the judgment, but to ensure that the first respondent's career prospects with the second respondent remains intact. For these considerations as well, I am compelled to exercise my discretion in favour of the applicant.

[59] I therefore conclude that the applicant has indeed shown exceptional circumstances to exist and has shown that it would suffer irreparable harm as opposed to the first respondent whose only harm is financial and is simply not irreparable. In addition, and in exercising my discretion in terms of Rule 49(11), I am satisfied that the balance of convenience certainly favour the applicant and considerations of equity and justice require relief that would ensure that the applicant, as victor, would not be left completely

unsatisfied and in essence high and dry by the first respondent simply invoking a process. Simply, put, without enforcement

pending an appeal, the restraint, despite being successfully enforced, has no value at all and will never have value. The

applicant has therefore successfully made out a case for the relief sought.

[60] I wish to make some final comments as to the issue of harm. I do not intend to interfere with the suspension of the costs order made in my judgment of 16 September 2014, which would further mitigate any financial prejudice to the first respondent. I

also specifically direct that the payment provisions in terms of the restraint agreement remain operative and are equally not suspended.

Costs

[61] This then only leaves the issue of costs. The fact of the matter is that the applicant, in bringing this application, seeks relief that is tantamount to an indulgence from this Court, and a departure from what is the norm. The first respondent was certainly justified in opposing such proceedings and should not be further burdened by a costs order in these proceedings. In terms of section 162 of the LRA I in any event have a wide discretion where it comes to the issue of costs. I believe that no order as to costs is appropriate.

Order

[62] In the premises, I make the following order:

62.1 The orders that I gave in paragraphs 92.1, 92.2, 92.3, 92.4 and 92.5 of my judgment handed down on 16 September 2014 shall not be suspended and shall continue to remain operative and binding, on all parties, pending the outcome of the appeal process, which process shall include the application for leave to appeal and/or petition for leave to appeal, and/or any appeal noted, if at all.

62.2 The provisions of section 18(4) of the Superior Courts Act of 2013 do not apply to the Labour Court, nor to any proceedings in or orders of, the Labour Court, and thus cannot be utilized by the first respondent.

62.3 There is no order as to costs in this application.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

APPLICANT:

Advocate I Miltz SC

Instructed by Cowan Harper Attorneys

FIRST RESPONDENT: Advocate J L Kaplan

Instructed by Ian Levitt Attorneys

[1] Act 10 of 2013. This Act became operational on 23 August 2013.

[2] Labour Relations Act 66 of 1995.

[3] Section 158(1)(j) of the LRA.

[4] Act 59 of 1959.

[5]

(2012) 33 ILJ 1393 (LAC) at para 12.

[6]

(2013) 34 ILJ 2821 (LAC) at paras 10 and 12.

[7]

(2006) 27 ILJ 1873 (LC).

[8]

(2012) 33 ILJ 929 (LC) at para 17.

[9]

(2005) 26 ILJ 126 (LC) at paras 7 – 8.

[10]

(1998) 19 ILJ 1204 (LC) at para 13.

[11]

(2002) 23 ILJ 2192 (LAC).

[12]

(2014) 35 ILJ 954 (LAC) at paras 37 – 38.

[13] Uniform Rules of the High Court.

[14]

(2014) 35 ILJ 1294 (LC) at para 11.

[15]

(2013) 34 ILJ 2024 (LC) at para 5.

[16]

(2011) 32 ILJ 382 (LC) at para 11. See also *Van Rooy v Nedcor Bank Ltd* (1998) 19 ILJ 1258 (LC); *Tourism, Hospitality and Sport Education and Training Authority v Tms-Shezi Industrial Services*

(2007) 28 ILJ 2828 (LC).

[17]

(2011) 32 ILJ 1249 (LC) at paras 10 – 11.

[18]

(2011) 32 ILJ 2959 (LC) at paras 24 – 25.

[19] *Id* at para 26.

[20]

(2003) 24 ILJ 857 (LC) at para 16.

[21]

(2003) 24 ILJ 2001 (LC) at para 17.

[22]

(2010) 31 ILJ 93 (LC) at para 17. See also *National Police Services Union v National Commissioner of the National Police Services and Others*

(1999) 20 ILJ 2408 (LC) at para 14.

[23] 1977

(3) SA 534 (A) at 544H – 546B.

[24]

(2011) 32 ILJ 2095 (LAC).

[25] *Id* at paras 24 – 25.

[26] 2006 (6) SA 568 (D) at 571H – 572B.

[27] 2010

(6) SA 166 (ECG) at 171C-D.

[28]

(2014) 35 ILJ 1647 (LC).

[29] *Id* at para 27.

[30] *Id* at para 27.

- [31] Id at para 28.
- [32] Id at paras 29 – 30.
- [33] 2014
- (3) SA 189 (GJ).
- [34] Id at para 16.
- [35] Id at para 21.
- [36] Id at para 24.
- [37] Labour Court Rule 30 reads: ‘(1) An application for leave to appeal to the Labour Appeal Court may be made, by way of a statement of the grounds for leave, at the time of the judgment or order. (2) If leave to appeal has not been made at the time of judgment or order, an application for leave must be made and the grounds for appeal furnished within 15 days of the date of the judgment or order against which leave to appeal is sought, except that the court may, on good cause shown, extend that period. (3A) ‘Unless the judge from whom leave to appeal is sought otherwise directs, the parties' respective submissions in respect of the application for leave to appeal must be (a) in writing; and (b) delivered on or before a date fixed by the judge’.
- [38] See Rule 4 of the Labour Appeal Court Rules.
- [39] *Sinuko v Powertech Transformers (DPM) and Others* (supra) at para 44.
- [40] Rule 5(22) reads: ‘A party may on notice to all other parties apply orally or in writing to the Judge President for an appeal to be heard urgently. If the application is successful, the Judge President must give directions as to the future conduct of the appeal’.
- [41] This has been done in the judgments of *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union* (2)
- (1997) 18 ILJ 671 (LAC); *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*
- (1997) 18 ILJ 971 (LAC); *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*
- (2014) 35 ILJ 983 (LAC); *TMS Group Industrial Services (Pty) Ltd v Unitrans Supply Chain* (unreported JA 58/2014) dated 6 August 2014.
- [42] Id at para 27
- [43] See for example *Multichoice Africa (Pty) Ltd v Broadcasting Electronic Media and Allied Workers Union and Others*

- (2012) 33 ILJ 177 (LAC); City of Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others
- (2012) 33 ILJ 1393 (LAC); SA Transport and Allied Workers Union v ADT Security (Pty) Ltd
- (2011) 32 ILJ 2112 (LAC).
- [44] National Entitled Workers Union and Others v Director, Commission for Conciliation, Mediation and Arbitration and Others (supra).
- [45] Incubeta Holdings (Pty) Ltd and Another v Ellis and Another (supra).
- [46] Id at para 12.
- [47] Id at para 14.
- [48] 1977 (4) SA 970 (R) at 972D – H.
- [49] Id at para 25.
- [50] Id at paras 28 – 29.
- [51]
- (1999) 20 ILJ 1300 (LC) at para 17.

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